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Mesnayo bin Longdi v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–41–03 OF 2012
AZIAH ALI, TENGKU MAIMUN AND VARGHESE GEORGE JJCA
30 NOVEMBER 2015

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Criminal Procedure — Appeal — Appeal against sentence and conviction — Accused charged with another person for murder — Accused convicted for offence while co-accused discharged and acquitted — Prosecution relied on testimony and identification of eyewitness in convicting accused — Defence of mere denial — Whether probable — Whether eyewitness credible witness — Whether subsequent conduct of accused consistent with his innocence — Whether accused guilty since there were no blood stains found on his clothing when he apprehended — Whether evidence of photographs in contravention of s 90A of the Evidence Act 1950 — Penal Code s 302

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One Amir ('the first accused') and the appellant were jointly charged at the High Court under s 302 of the Penal Code for the murder of one Demeh ('the deceased'). It was the prosecution's case that the first accused had gone to the deceased's house to purchase some 'kuih'. The first accused then asked the deceased to massage him. The deceased's daughter ('SP4') was with her at the material time. SP4 rushed to the kitchen when she heard the deceased screaming for help and saw the appellant stabbing the deceased repeatedly with a knife. SP4 dragged the deceased away to prevent her from being stabbed further. According to SP4, the appellant fled the scene through the kitchen door at the back but re-appeared at the scene two hours later. Post-mortem conducted revealed that there were multiple stab wounds and other injuries on the body of the deceased. The cause of death was stated to be massive bleeding from those stab wounds. The appellant's defence was a mere denial. The trial judge held that there was some uncertainty in SP4's evidence and there was insufficient evidence to infer that the first accused had any 'common intention' with the appellant to commit the acts that caused the deceased's death. The first accused was acquitted and discharged but the appellant was convicted for the charge for the murder of the deceased. Hence, the present appeal. There issues that arose were (a) whether SP4 was a credible witness; (b) whether the subsequent conduct of the appellant was consistent with the innocence of the appellant; (c) there were no blood stains found on the appellant's clothing when he was apprehended; and (d) the trial judge erred in admitting the evidence of photographs because such admission was in contravention of s 90A of the Evidence Act 1950 ('the EA').

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Held, dismissing the appeal; affirming the conviction:

(1) There was no finding that SP4 was not a credible witness or that the whole of her testimony ought not to be believed. The court had analysed the evidence of SP4 separately from the first accused and the appellant. It was only that part of SP4's testimony that the first accused was also involved in the act of stabbing the deceased that the court found not safe to be relied upon. The trial judge ruled that SP4's version implicating the first accused could have been tainted by what she heard from others after she had returned from the hospital, namely that the first accused and the appellant had been arrested for the murder. SP4 was a direct eyewitness to the stabbing of the deceased. The appellant, whom she saw stabbing her mother repeatedly and then fleeing from the back of the house, was her stepfather. Her evidence as to the identity of the appellant, the stabbing and the hurried escape by the appellant from the scene withstood vigorous cross-examination by the defence and remained unshaken. There was no reasonable grounds not to accept SP4's direct evidence (see paras 18–19 & 21).

(2) Whether the shirt worn by the appellant bore blood stains or not were not material and could not be the sole factor to disprove the whole of the prosecution's case against the appellant. The trial judge had not misdirected himself or had failed to give sufficient consideration to the defence when he decided to reject the defence. A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient. The mere fact that the appellant appeared on the scene of the crime some two hours later did not by itself constitute a 'reasonable doubt' as to his culpability on the totality of the prosecution's evidence against him (see paras 24 & 27).

(3) A certificate under s 90A(2) of the EA is not the only method to prove that a document was produced by a computer 'in the course of its ordinary use' under s 90A(1) of the same. The fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under s 90A(2) or by oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but of also the matters presumed under s 90A(4). Irrespective of whether a certificate under s 90A(2) was produced in court or not, there was no issue as to the true identity of the named deceased. SP4 as the child of the deceased and as eyewitness to the incident which led to her mother's death, had positively identified the deceased in her evidence in court. There was other positive evidence apart from the photographs to confirm the identity of the deceased. The appellant's conviction was safe (see paras 30, 32 & 35).

[Bahasa Malaysia summary

Amir ('tertuduh pertama') dan perayu bersama didakwa di Mahkamah Tinggi di bawah s 302 Kanun Keseksaan kerana membunuh Demeh ('si mati'). Ia adalah kes pendakwaan bahawa tertuduh pertama telah pergi ke rumah si mati untuk membeli beberapa 'kuih'. Tertuduh pertama kemudian meminta si mati mengurutnya. Anak perempuan si mati ('SP4') berada bersamanya pada masa matan. SP4 bergegas ke dapur apabila dia mendengar si mati menjerit meminta tolong dan melihat perayu menikam si mati berulang kali dengan pisau. SP4 mengheret si mati jauh untuk mengelakkannya daripada ditikam selanjutnya. Menurut SP4, perayu lari dari tempat kejadian melalui pintu dapur di belakang tetapi muncul semula di tempat kejadian dua jam kemudian. Bedah siasat yang dilakukan mendedahkan bahawa terdapat pelbagai kecederaan tikaman dan kecederaan lain ke atas badan si mati. Sebab kematian dinyatakan sebagai pendarahan yang banyak daripada luka-luka tikaman tersebut. Pembelaan perayu hanya satu penafian. Hakim perbicaraan memutuskan bahawa terdapat ketidakpastian dalam keterangan SP4 dan tiada keterangan yang mencukupi untuk membuat kesimpulan bahawa tertuduh pertama mempunyai 'common intention' dengan perayu untuk melakukan tindakan yang menyebabkan kematian si mati. Tertuduh pertama telah dilepas dan dibebaskan tetapi perayu telah disabitkan dengan pertuduhan kerana membunuh si mati. Justeru, rayuan ini. Isu-isu yang timbul adalah: (a) sama ada SP4 saksi yang boleh dipercayai; (b) sama ada perlakuan perayu seterusnya konsisten dengan kejujuran perayu; (c) tiada kesan darah dijumpai atas pakaian perayu semasa dia ditahan; dan (d) hakim perbicaraan terkhilaf apabila menerima keterangan gambar foto kerana penerimaan sedemikian bertentangan dengan s 90A Akta Keterangan 1950 ('AK').

Diputuskan, menolak rayuan; mengesahkan sabitan:

(1) Tiada penemuan bahawa SP4 bukan saksi yang boleh dipercayai atau yang keseluruhan keterangannya tidak patut dipercayai. Mahkamah telah menganalisis keterangan SP4 secara berasingan daripada tertuduh pertama dan perayu. Ia hanya di mana satu bahagian keterangan SP4 yang tertuduh pertama juga terlibat dengan tindakan menikam si mati yang mahkamah mendapati adalah tidak selamat untuk digunakan. Hakim perbicaraan memutuskan bahawa versi SP4 mengaitkan tertuduh pertama mungkin dicemari oleh apa yang didengar olehnya daripada orang lain selepas dia pulang daripada hospital, iaitu bahawa tertuduh pertama dan perayu telah ditangkap kerana membunuh. PS4 adalah saksi utama kepada penikaman si mati. Perayu, yang dilihatnya menikam ibunya berulang kali dan kemudian lari dari belakang rumah, adalah bapa tirinya. Keterangannya berhubung identiti perayu, penikaman itu dan melarikan diri dengan tergesa-gesa oleh perayu dari tempat kejadian telah berjaya bertahan dengan pemeriksaan balas yang bersungguh-sungguh oleh pihak pembelaan dan kekal tak goyah. Tidak

ada alasan yang munasabah untuk tidak menerima keterangan langsung SP4 ini (lihat perenggan 18–19 & 21).

(2) Sama ada kemeja yang dipakai oleh perayu mempunyai kesan darah atau tidak bukan material dan tidak boleh menjadi faktor tunggal untuk menyangkal keseluruhan kes pendakwaan terhadap perayu. Hakim perbicaraan tidak salah arah atau gagal memberi pertimbangan yang sewajarnya kepada pembelaan apabila beliau menolak pembelaan itu. Penafian semata-mata tanpa bukti lain untuk mengetepikan secara munasabah bukti pendakwaan tidak mencukupi. Hakikat bahawa perayu muncul di tempat kejadian kira-kira dua jam kemudian tidak dengan sendirinya mempunyai satu 'reasonable doubt' tentang kebersalahan di atas keseluruhan keterangan pendakwaan terhadapnya (lihat perenggan 24 & 27).

(3) Sijil di bawah s 90A AK bukan hanya satu cara untuk membuktikan bahawa dokumen telah dikeluarkan oleh komputer 'in the course of its ordinary use' di bawah s 90A AK. Fakta bahawa dokumen dikeluarkan oleh komputer dalam menjalankan penggunaannya yang biasa boleh dibuktikan dengan menenderkan dalam keterangan itu satu sijil di bawah s 90A(2) atau melalui keterangan lisan. Keterangan lisan sebegini perlu terdiri bukan sahaja kenyataan bahawa dokumen yang dikeluarkan oleh komputer dalam menjalankan penggunaannya yang biasa tetapi juga tentang perkara-perkara yang diandaikan di bawah s 90A(4). Tidak kira sama ada suatu sijil di bawah s 90A(2) dikemukakan di mahkamah atau tidak, tiada isu berhubung identiti sebenar si mati yang dinamakan. SP4 sebagai kanak-kanak si mati dan sebagai saksi utama kepada kejadian yang membawa kepada kematian ibunya, telah dengan positif mengenal pasti si mati dalam keterangannya di mahkamah. Terdapat keterangan positif lain selain daripada gambar foto untuk mengesahkan identiti si mati. Sabitan perayu adalah selamat (lihat perenggan 30, 32 & 35).]

Notes

For a case on appeal against sentence and conviction, see 5(1) *Mallal's Digest* (5th Ed, 2015) para 486.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)

Bank Pembangunan Malaysia Berhad (Company No 16562-K) v Sasacom Sdn Bhd (Company No 146522-U) [2010] MLJU 1402; [2011] 10 CLJ 51, HC (refd)

Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134; [2006] 3 CLJ 269, CA (refd)

Lim Hean Chong @ Teo Hean Chong v PP [2012] 1 MLJ 149; [2012] 2 CLJ 1046, CA (refd)

PP v Ling Tee Huah [1982] 2 MLJ 324; [1980] 1 LNS 212 (refd)

Legislation referred to

Criminal Procedure Code s 402
Evidence Act 1950 ss 90A, 90A(1), (2), (4)

Appeal from: Criminal Trial No 45B-6 of 2011 (High Court, Johor Bahru).

Choong Kak Sen (Gooi & Azura) for the appellant.
Nurshafini bt Mustafha (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Varghese George JCA:

INTRODUCTION

[1] Amir bin Che Muda ('the first accused') and Mesnayo bin Longdi ('the appellant') were jointly arraigned before the High Court at Johore Bahru for the murder of Demeh bt Tinak ('the deceased').

[2] The charge brought against the accused read as follows:

> Bahawa kamu bersama-sama pada 16 Mac 2011 jam lebih kurang 2.40 petang, di No 88, Jalan Seniman 2, Kg Seri Serdang, Batu 6, Tampoi, dalam daerah Johor Bahru, dalam Negeri Johor Darul Ta'zim, untuk meneruskan niat bersama kamu semua, telah membunuh Demeh binti Tinak (KPT 680121-17-5080) dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun Keseksaan Kanun yang sama.

[3] At the close of the prosecution case the learned trial judge found that a prima facie case had not been established against the first accused and accordingly acquitted and discharged him. The learned trial judge however found that a prima facie case had been made out against the appellant and ordered the appellant to enter his defence.

[4] The appellant gave his evidence under oath. No other witness was called for the defence. At the close of the trial, the court found that no reasonable doubt had been raised by the appellant's defence and proceeded to convict and sentence the appellant to death by hanging.

[5] This was the appeal of the appellant against that conviction and sentence.

THE PROSECUTION CASE

[6] It was the prosecution's case that on 16 March 2011 the first accused had gone to the deceased's house to purchase some 'kuih'. The first accused had then asked the deceased to massage (*mengurutnya*) him. The daughter of the deceased Mahmudah ('SP4') was with her mother at that time in the house.

[7] SP4 had gone to lie down in the sitting hall (*ruang tamu*) of the house when she heard the deceased screaming for help. SP4 rushed to the kitchen and saw the appellant stabbing the deceased (who was on the floor) repeatedly with a knife (*pisau*).

[8] SP4 dragged her mother away to prevent being stabbed further. She then saw the appellant, who was her step-father, running away from the scene through the kitchen door at the back. SP6 (Nor Farhana) a neighbour who was also alerted by loud quarrelling-noises and screams coming from the deceased's house, saw the appellant running away from that area through the back of the house. The appellant was known to SP6 as the ex-husband of the deceased.

[9] The deceased had been identified by SP4 (albeit, through the photograph exh P4(2) and by SP10 (ASP Tan Yang Siong, the IO). SP3 (Dr Rohayu bt Sakar Adnan) who conducted the post-mortem had found multiple stab wounds and other injuries on the body of the deceased. The three major stab wounds inflicted to the deceased chest had perforated the major organs in the chest cavity, namely the heart and both lungs. The cause of death was stated to be massive bleeding from those stab wounds. SP3 had also testified that the stab wounds inflicted on the deceased was sufficient in the ordinary course of nature to cause death.

FINDINGS OF THE TRIAL JUDGE

[10] The learned trial judge was satisfied that the deceased had been properly identified and that the multiple stab wounds to the chest was the cause of death of the deceased.

[11] The learned trial judge observed that the prosecution relied on both direct and circumstantial evidence to show that the death of the deceased was caused by the acts of the first accused and the appellant. The eyewitness testimony of SP4 was the crucial evidence in this respect, noted the learned trial judge.

[12] The learned trial judge accepted that there was some uncertainty in so far as SP4's evidence implicating the first accused to the stabbing was concerned. Further there was insufficient evidence to infer that the first accused

(apart being there to purchase 'kuih' and for a massage) had any 'common intention' with the appellant to commit the acts that caused the deceased's death. As alluded to above, the first accused was acquitted and discharged by the court at the close of the prosecution's case.

[13] However on a maximum evaluation of the evidence led by the prosecution, the learned trial judge held that there was sufficient evidence for the appellant to be convicted of the charge for the murder of the deceased, unless rebutted in defence.

[14] The learned trial judge after evaluating the sworn evidence of the appellant held that the defence of the appellant was a bare denial, namely, of not being at the scene of the incident (an alibi) without any other supporting evidence to back that claim. The court held that the appellant had not raised any reasonable doubt on the case made out by the prosecution.

THE APPEAL

[15] Before us, counsel for the appellant confined the appeal to four grounds, as summarised below:

(a) the conviction of the appellant was based on the sole eye witness evidence of SP4. SP4 was not a credible witness as the learned trial judge himself had rejected SP4's evidence and acquitted the first accused. This was a manifest contradiction in the position taken by the learned trial judge and this was without good or cogent reasons;

(b) the subsequent conduct of the appellant was consistent with the innocence of the appellant;

(c) there was no blood stains found on the clothing/shirt of the appellant when he was apprehended; and

(d) the learned trial judge had erred in admitting the photographs P4(1) to P4(41) and P6(1) to P6(36), in that, such admission in evidence was in contravention of s 90A of the Evidence Act 1950 ('the EA').

OUR DELIBERATIONS AND DECISION

Credibility of SP4

[16] It was submitted for the appellant that the infirmities in the evidence of SP4, which had led to the first accused being not required to enter his defence by the learned trial judge, was equally applicable to the appellant. It was argued that the question before the court was as to the credibility of SP4's testimony in

court; this the learned trial judge had rejected with respect to the first accused but was however willing to accept in so far as it implicated the appellant.

[17] It was also contended that there were discrepancies between the testimonies of SP4 and SP6 which was recognised by the learned trial judge; this too raised serious doubts as to the credibility of SP4's evidence.

[18] We could not agree with the appellant. We have examined the analysis of the evidence by the learned trial judge as found in the grounds of judgment. Firstly, there was no finding by the trial judge that SP4 was not a credible witness or that the whole of her testimony ought not to be believed. The court had analysed the evidence of SP4 separately, vis a vis the first accused, from that vis a vis the appellant. It was only that part of SP4's testimony that the first accused was also involved in the act of stabbing the deceased that the court found not safe to be relied upon.

[19] SP4 herself had been stabbed and she had told the doctor who attended to her at the hospital immediately thereafter that she could not identify her assailant and that she had thereafter fainted at the scene of the incident. In court however SP4 stated that the first accused also stabbed the deceased. When questioned further she stated she was in a state of panic and could not describe how the first accused inflicted the wounds. It was this aspect of the evidence that the court held gave rise to some doubts as to whether the first accused too was involved in the stabbing of the deceased. The learned trial judge ruled that SP4's version implicating the first accused could have been tainted by what she heard from others after she had returned from the hospital, namely that the first accused and the appellant had been arrested for the murder.

[20] There were other reasons that the court took into consideration before acquitting the first accused, including the fact that the first accused, although he appeared to be in a state of panic, did not flee from the vicinity of the deceased's house but had remained there (see evidence of SP6).

[21] SP4 was a direct eyewitness to the stabbing of the deceased. The appellant, whom she saw stabbing her mother repeatedly and then fleeing from the back of the house, was her step-father. Her evidence as to the identity of the appellant, the stabbing and the hurried escape by the appellant from the scene withstood vigorous cross-examination by the defence and remained unshaken. There was no reasonable grounds not to accept SP4's direct evidence and we did not find that the learned trial judge had misdirected himself in the appreciation of the evidence before the court.

The appellant's conduct

[22] It was the appellant's counsel's submission that the appellant (who was apprehended by SP10 at the scene) was only there as a member of the public, some two hours after the incident. It was argued that if it was the appellant who had indeed caused the death of the deceased, naturally he would not return to the scene of the crime. Hence the appellant's defence that he received a phone call informing him of the murder of his ex-wife at her home and he had gone there after that to enquire, ought to have been accepted by the court.

[23] The learned trial judge, we note, had ruled that the appellant's defence, an alibi in effect, was firstly a bare denial without any other supporting evidence to show that the appellant was at the place he claimed to have been (Larkin) at about the time the stabbing took place as witnessed by SP4. Secondly, the learned trial judge noted that no notice of the alibi had been given by the defence before commencement of trial as required by the then s 402 of the Criminal Procedure Code and this was mandatory and consequently fatal to the defence case.

[24] We did not find the learned trial judge to have misdirected himself or had failed to give sufficient consideration to this defence when he decided to reject the defence. The learned trial judge was correct to apply the guideline on this issue as summarised aptly by Yusoff Mohamed J (as he then was) in *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324; [1980] 1 LNS 212, namely: 'A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient'. The mere fact that the appellant appeared (or rather reappeared) on the scene of the crime some two hours later did not by itself constitute a 'reasonable doubt' as to his culpability on the totality of the prosecution's evidence against him.

No blood stains on the appellant's clothing

[25] The thrust of the third ground of appeal was that SP6 who testified that she saw the appellant hurriedly leaving the deceased's house did not state that there was blood stains on the clothing of the appellant at that time. Such blood stains would have been an inevitable occurrence, if the appellant was the one who had committed the repeated stabbing of the deceased. It was pointed out that SP6 had only said the appellant was wearing a white shirt when she saw him running away. Counsel for the appellant cited the decision of this court in *Lim Hean Chong @ Teo Hean Chong v Public Prosecutor* [2012] 1 MLJ 149; [2012] 2 CLJ 1046 as supporting his contention.

[26] We have examined the notes of proceedings with respect to SP6's testimony in court. We did not find that it was specifically put to SP6 during

cross-examination that the appellant's shirt had no blood stains. SP6 could only have had in any case a fleeting sight of the appellant hurriedly leaving the deceased's house through the back. There was otherwise in this case, ample eyewitness evidence ('SP4') to directly implicate the appellant with the stabbing of the deceased.

[27] It must be noted that SP6's evidence stood unrebutted in so far as it firmly identified the appellant, who was familiar to this witness, as the person seen by her running ('lari') away from the scene at about the time when the screams and the commotion at the deceased's house took place. In our view, whether the shirt worn by the appellant bore blood stains or not were not material and could not be the sole factor to disprove the whole of the prosecution's case against the appellant.

Section 90A of the EA not complied with

[28] The final ground of appeal canvassed before us was that the photographs P4(1)-P4(41) and P6(1)-(36) taken by use of digital cameras ought not to have been admitted by the court as no certificate required under s 90A of the EA had been tendered to the court. The photographs, which were tendered through SP1 and SP2, had been downloaded from the memory card of the respective cameras onto two CDs and the CDs too were produced in court and marked as exhs P5 and P7.

[29] Counsel for the appellant when questioned by us conceded that no question was put or any challenge raised with the two photographer-witnesses with regard to the working order of the digital cameras involved. That was therefore a non-issue. By the terms of s 90A(4) the purpose underlying the requirement of a 'certificate' was basically to create a presumption in law that the 'computer' (as the case may be) was in good working order and operating properly. (The appellant's counsel cited *Bank Pembangunan Malaysia Berhad (Company No 16562-K) v Sasacom Sdn Bhd (Company No 146522-U)* [2010] MLJU 1402; [2011] 10 CLJ 51 to contend that a 'digital camera' has been held to fall within the definition of a 'computer' under the EA.)

[30] Firstly, we need only say that in law a certificate under s 90A(2) was not the only method to prove that a document was produced by a computer 'in the course of its ordinary use' under s 90A(1) of the EA. The fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under s 90A(2) or by oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but of also the matters presumed under s 90A(4) (good working order) (see Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 which

approved the analysis of s 90A by Augustine Paul JCA (as he then was) in *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134; [2006] 3 CLJ 269.)

[31] Be that as it may, the bone of the appellant's contention behind this ground of appeal was that SP4 had only identified the deceased as her mother by way of reference to photograph P4-2 and not personally at the time of the commencement of the post-mortem. It was being argued here that hence there was no admissible identification of the deceased at all, and the appellants conviction could not stand, as even the first ingredient to be proven in respect of a murder charge had not been proven.

[32] We were agreeable with the learned DPP that irrespective of whether a certificate under s 90A(2) was produced in court or not, there was no issue as to the true identity of the named deceased. SP4 as the child of the deceased and as eyewitness to the incident which led to her mother's death, had positively identified the deceased in her evidence in court. We were of the view that there was other positive evidence apart from the photographs to confirm the identity of the deceased (like that of SP5 and SP6, who had known the deceased as their neighbour and of SP10, the IO who did confirm the identity of the deceased at the post mortem).

[33] We therefore found no merits in this desperate ground of appeal, as there was sufficient evidence to confirm that the deceased was Demeh bt Tinak indeed.

CONCLUSION

[34] It was highlighted to us by learned DPP that of particular note in this case was the fact that the appellant had in his own evidence in court adverted to a motive behind his actions which had led to the death of the deceased. Although at the time of the crime the appellant was divorced from the deceased, the appellant had always resented the deceased providing massage service to men-clients and this had led to frictions as between them.

[35] On the totality of the evidence and for the reasons discussed by us above, we did not find the learned trial judge had erred in convicting the appellant. In our unanimous view, the conviction was safe and accordingly the appeal was dismissed.

Appeal dismissed; conviction affirmed.

Reported by Afiq Mohamad